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COMMISSION Office of Legal Affairs
OFFICE OF GENERAL
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2008 NOV 14 A 11:08

November 12, 2008

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Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Elections Commission
Office of the General Counsel
999 E. Street, N.W.
Washington, D.C. 20463

Re: WOSU Public Media Response to Complaint MUR 6111

Supervisory Attorney Jordan:

WOSU Public Media ("WOSU") makes this Response to the November 3, 2008 letter from the FEC General Counsel's Office referencing the October 22, 2008 Complaint letter of Mr. Bill Buckel ("the Complaint"). The Complaint claims, in part, that WOSU violated the Federal Election Campaign Act of 1971 as amended ("the Act") by its debate policy guideline concerning Third party or Independent Candidates. WOSU hereby submits this Response to clearly set out that WOSU acted legally, reasonably, and professionally in setting a reasonable policy, and that no further action by the FEC is required.

BACKGROUND

By way of background, WOSU is owned and operated by The Ohio State University, an instrumentality of the State of Ohio. In March of 2008, WOSU adopted Debate Guidelines on Third Party or Independent Candidates. Those Guidelines were provided to Mr. Buckel by Paula J. Mayo of WOSU in a letter of October 8, 2008 (Attachment A). Those Guidelines state:

Third – Party or Independent Candidates

WOSU will include in debates all qualified candidates who have demonstrated a measurable chance of election to the office they seek. However, the mere presence of a candidates name on the ballot is not enough. To be included, a candidate has to demonstrate that he/she satisfies the following two objective criteria:

WOSU PUBLIC MEDIA RESPONSE
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- *He/She is a legally qualified candidate under the rules established by the Federal Communications Commission (based on one of the following): A) has publically announced his/her intention to run for the office, is qualified under applicable law to hold the office, and has qualified for a place on the ballot; or (B) has publically committed to seeking election by the write-in method and documents that he/she is conducting an active campaign, including having a staffed campaign headquarters and receiving press coverage; and*
- *Has received five percent (5%) or more of support in a professionally conducted public opinion survey by an independent pollster.*

If a candidate has not met the above criteria, she/he will not be included in a WOSU produced debate because such participation will hinder the audience's understanding of the positions held by candidates who have a legitimate chance of winning election. The final decision concerning a candidate's satisfaction of the criteria rests with the management of WOSU public media.

Mr. Buckel's complaint concerns a broadcast debate on public television and radio co-sponsored by WOSU and the Columbus Metro Club on Thursday October 16, 2008. (Attachment B) That debate involved candidates for Ohio's 15th Congressional District; incumbent Democrat Mary Jo Kilroy, Republican Steve Slivers, and Independent Don Elijah Eckhart. A fourth candidate associated with Mr. Buckel, Libertarian Mark Noble, did not meet the participation guidelines, as independent polls showed he had only two percent (2%) of support. (Attachment C)

More specifically, in his complaint Mr. Buckel notes:

Specific Complaint #1

Recent events have shown that the actions of the cosponsors of the WOSU-TV program that was aired on Thursday, October 16th at 8:00 pm did give preferential exposure to three of the four candidates running for the House of Representatives in the 15th Congressional District. Whatever vote-receiving advantage the three candidates had over Mark Noble, it was undoubtedly enhanced by the TV debate because undecided voters did not learn of Mark Noble's candidacy. A search of the FEC web site showed that neither co-sponsor is registered as a PAC. I believe they should be expected to do so and then expected to file the required forms with the FEC.

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Specific Complaint #2

It is my understanding that candidates who receive independent campaign help from outside groups need to list that help on their campaign finance forms. If so, the finance forms from the three "debating" candidates should reflect the help they received from the cosponsors. Contact information for the candidates is provided . . . that the FEC may double check their expense reports.

WOSU'S ACTIONS ARE CONSISTENT WITH THE LAW

Mr. Buckel's "Specific Complaint #1" alleges "preferential exposure" to the three participants of the October 16, 2008 debate. Additionally, and although unclear by the language of the Complaint, Mr. Buckel also apparently alleges WOSU and the Columbus Metro Club as co-sponsors of the debate are actually PAC's, and must so register because they are providing "independent campaign help" to the three participants of the debate.

Regardless if the language in Mr. Buckel's "Specific Complaints", the only action that is at issue is the application of the WOSU Debate guidelines to exclude Mr. Noble from participation. Thus, the only legal question at issue is whether WOSU has an obligation to allow every candidate access to a debate? It clearly does not have such an obligation.

The United States Supreme Court considered a virtually identical case in Arkansas Educational Television Commission v. Forbes, ___ U.S. ___ (1998) (96-779) 93 F.3d 497, reversed. In that case the AETC, a group of public broadcasting stations, developed guidelines for a series of 1992 debates. Because of time constraints of the debates, the AETC guidelines limited the participation in the debates to major party candidates or any other candidate who had strong popular support. The AETC staff testified that they excluded Ralph Forbes, an independent candidate, from a debate by candidates for Representative of the 3rd Congressional District because he lacked any campaign organization, had not generated appreciable voter support, and was not regarded as a serious candidate by the press covering the election.

The Court determined that the debate was a nonpublic forum, from which AETC could exclude Forbes in the reasonable, viewpoint neutral exercise of its journalistic discretion. See also, Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 110 (1973) (Television broadcasters enjoy the "widest journalistic freedom" consistent with their public responsibilities.) The Court reasoned that the inability to exclude any candidate would place an extreme burden on broadcasters (noting some 21 candidates for President in prior elections) and would actually limit the information

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available to voters as broadcasters would choose not to air political debates for "the prospect of cacophony on one hand and First Amendment liability on the other." AETC at 14. A candidate's exclusion from a nonpublic forum must not be based on objections or opposition to his views, but must be otherwise reasonable in light of the purpose of the debates. AETC at 15; Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800 (1985). The Court held that AETC decision to exclude Forbes was a reasonable, viewpoint neutral exercise of journalistic discretion consistent with the First Amendment. AETC at 16.

In the matter at hand, the WOSU Guidelines meet all the requirements of an exercise in journalistic discretion as set forth by the Supreme Court in AETC, supra. The WOSU Guidelines are reasonable. The WOSU broadcasted debates are limited by time constraints, and the guidelines are to ensure that the voters see and/or hear as much as possible from candidates who have a legitimate chance of being elected. The WOSU Guidelines are viewpoint neutral. No political viewpoints are considered in the application of the policy, only the objective criteria of whether the individual is a qualified candidate under FCC rules, and whether they have received 5% or more of support in a professionally conducted public opinion survey by an independent pollster. Clearly this is so as a third party candidate, Don Elijah Eckhart, participated in the October 16, 2008 debate in question.

Mr. Buckel's "Specific Complaints" that seek PAC status for the co-sponsors of the debate are off the mark. For his Complaints to be viable, the FEC would have to accept the premise that the exclusion of any candidate from any debate would somehow alter the status not only of the debate itself, but also its co-sponsors, and participants. WOSU did not provide any "independent support" for the candidates who debated. It provided a neutral forum for the political viewpoints of the candidates consistent with its responsibilities to serve the public interest, convenience, and necessity. The exclusion of Mr. Noble was reasonable, viewpoint neutral, and consistent with applicable law.

WOSU'S ACTIONS ARE CONSISTENT WITH SIMILAR ORGANIZATIONS

While not legal precedent, it is important to note that WOSU's actions in the creation and implementation of its debate Guidelines are consistent with those of similarly situated organizations. The Commission on Presidential Debates has determined in its Candidate Selection process that candidates must show "Indicators of Electoral Support" of at least fifteen percent (15%) of the national electorate as determined by five selected national public opinion polling organizations. (Attachment D) Similarly the League of Women Voters determines its own criteria for debates which to limit the debates to viable candidates. (Attachment E).

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CONCLUSION

WOSU's Third-party and Independent Candidate Debate guidelines are reasonable, viewpoint neutral and consistent with applicable law. There has been no violation of the Act, and no action should be taken against WOSU Public Media in this matter.

Respectfully submitted,



Daniel R. Beerck
Associate Legal Counsel
The Ohio State University

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SECRETARIAT

Assigned complaint - Page 1

Ms. Retha Dixon, Docket Manager
Office of General Counsel
Federal Elections Commission
999 E Street, N.W.
Washington, DC 20463
Ph. 202-694-1650

October 22, 2008

SENSITIVE

- COPY -

MUR# 6111

Dear Ms. Dixon:

This is in response to your letter of October 15, 2008, and the enclosed "Filing a Complaint" brochure. Thank you for the guidance. This letter is my refined complaint. Unfortunately, your letter carried two errors which might impact your complaint-timing schedule. My letter was dated October 12, 2008, not October 7, 2008. Accordingly, I presume it arrived in your office sometime after October 12th, not on October 7th.

REFINED COMPLAINT

In brief: The WOSU Public Media and the Columbus Metropolitan Club, neither of which is registered with the Federal Elections Commission (FEC) as a political action committee (PAC), have cosponsored a public forum for candidates in the 15th Congressional District of Ohio. These two institutions knowingly excluded Mark Noble, one of the four on-the-ballot candidates from the event. Thus, they functioned as political action groups. Mark Michael Noble, Libertarian Party of Ohio, is listed on the Franklin County Board of Elections web site as a qualified candidate in the 15th Congressional District. The URL of the Board of Elections is: www.Vote.FranklinCountyOhio.gov.

In detail: Reference is made to my letter of October 12, 2008 and an attached letter of October 8, 2008 letter from WOSU. The October 12, 2008 letter was my first attempt at filing a complaint with the Federal Elections Commission (FEC). The stated opinions and reported facts in that letter are still valid.

ATTACHMENT A is one copy of my October 12, 2008 letter for background information. **ATTACHMENT A** has a copy of the WOSU policy guideline.

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Refined complaint - Page 2

ATTACHMENT B is a printout of a 2008-10-17 posting on the WOSU web site. The posting is titled "15th Congressional District candidates debate economy, negative ads". This printout shows that the candidate debate did take place, and that candidate Mark Noble was not present. This happened in spite of a request from Mark Noble and a "heads up" letter (10/12/08) from the undersigned to the cosponsors. (During a prior telephone conversation with Mr. Noble, he mentioned that he tried to obtain an invitation to join the TV debate.) At the bottom of the printout the cosponsors of the debate are listed as the Columbus Metropolitan Club and WOSU.

A possible contact for information concerning the Columbus Metropolitan Club is:

Ms. Jane Scott
Columbus Metropolitan Club
100 East Broad St.
Columbus, OH 43215
Ph. 614-464-3220.

A possible contact for information concerning the WOSU Public Media is:

Mr. Tom Rieland
WOSU Public Media
2400 Olentangy River Road
Columbus, OH 43210-1027
Ph. 614-292-9678

ATTACHMENT C gives contact information for the four candidates in the 15th Ohio Congressional District.

ATTACHMENT D is a copy of Page 3 of the Voter Information Bulletin (VIB) put out by the League of Women Voters of Metropolitan Columbus for the November 2008 election. All four 15th Ohio Congressional District candidates are treated equally. The full VIB may be seen on web site www.lwvcols.org. The local League of Women voters chapter is a trusted source for political-neutral voter information. The League does not operate like a PAC.

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Refined complaint - Page 3

Specific Complaint #1

Recent events have shown that the actions of the cosponsors of the WOSU-TV program that was aired on Thursday, October 16th at 8:00 pm did give preferential exposure to three of the four candidates running for the House of Representatives in the 15th Congressional District. Whatever vote-receiving advantage the three candidates had over Mark Noble, it was undoubtedly enhanced by the TV debate because undecided voters did not learn of Mark Noble's candidacy. A search of the FEC web site showed that neither cosponsor is registered as a PAC. I believe they should be required to do so and then be expected to file the required forms with the FEC.

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It is my understanding that candidates who receive independent campaign help from outside groups should list that help on their campaign finance forms. If so, the finance forms from the three "debating" candidates should reflect the help they received from the cosponsors. Contact information for the candidates is provided in ATTACHMENT C that the FEC may double-check their expense reports.

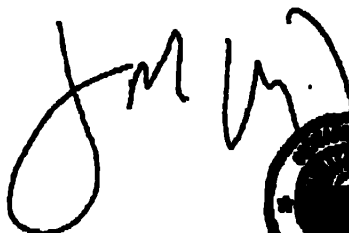
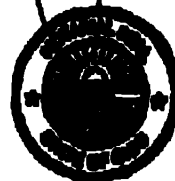
Sincerely,

Bill Buckel

Bill Buckel

Columbus, OH 43212

Subscribed and sworn to before
me on this 22nd day of October, 2008

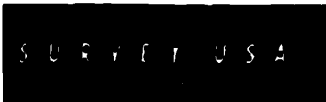
Ryan M. Rice
Notary Public, State of Ohio
My Commission Expires 03/31/2012

Attached:

- A. One copy of complainant's October 12, 2008 letter.
- B. Printout from the WOSU web site.
- C. Contact information for candidates.
- D. Voter Information Bulletin.

Enc.: Three copies of this communication

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10/27/2008 Election Poll #14674

Geography: OH 15th Congressional District

Data Collected: 10/25/2008 - 10/26/2008

Release Date: 10/27/2008

Sponsor:

WCAMH-TV Columbus

Show Percentages

Printer Friendly PDF

Statement Of Methodology

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Results of SurveyUSA Election Poll #14674

Democrat Kilroy Maintains Narrow Advantage in OH-15 Pick-Up Opportunity: In an election for U.S. House of Representatives today, 10/27/08, eight days until votes are counted to fill the open seat in Ohio's 15th Congressional District, Democrat Mary Jo Kilroy maintains a slight edge over Republican Steve Stivers, according to this latest SurveyUSA tracking poll conducted exclusively for WCMH-TV Columbus. Today, it's Kilroy 47%, Stivers 41%, Independent Don Eckhart 6%, Libertarian Mark Noble 2%. Compared to a SurveyUSA poll 5 weeks ago, Kilroy is flat; Stivers is down 1. Kilroy leads by 16 points among those who tell SurveyUSA they have already voted; Stivers and Kilroy are tied among those who have not yet voted, but whom SurveyUSA determines are likely to do so. 800 adults were interviewed 10/25/08 and 10/26/08. Of them, 692 were registered to vote. Of them, 632 were determined by SurveyUSA to have already voted, or to be likely to vote on or before election day.

If the election for U.S. House of Representatives, were today, would you vote for ... (names rotated) Republican Steve Stivers? Democrat Mary Jo Kilroy

632 Likely And Actual Voters	All	Gender		Age				<50 / 50+		Race		
Margin of Sampling Error: ± 4%		Male	Female	18-34	35-49	50-64	65+	18-49	50+	White	Black	Hispanic
Steve Stivers (R)	41%	45%	38%	35%	42%	40%	50%	38%	44%	44%	20%	**
Mary Jo Kilroy (D)	47%	43%	51%	53%	44%	48%	38%	48%	46%	45%	65%	**
Don Eckhart (I)	6%	7%	5%	5%	8%	6%	4%	7%	5%	6%	7%	**
Mark Noble (L)	2%	3%	1%	2%	3%	2%	1%	3%	2%	2%	1%	**
Undecided	4%	3%	5%	4%	3%	3%	5%	4%	4%	3%	7%	**
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Composition of Likely And Actual Voters	100%	48%	51%	23%	32%	29%	16%	55%	45%	89%	7%	3%

** Too few respondents of this type were interviewed for this data to be meaningful.

Attachment D



Candidate Selection Process

Commission on Presidential Debates' Nonpartisan Candidate Selection Criteria for 2008 General Election Debate Participation

A. Introduction

The mission of the nonpartisan Commission on Presidential Debates (the "CPD") is to ensure, for the benefit of the American electorate, that general election debates are held every four years between the leading candidates for the offices of President and Vice President of the United States. The CPD sponsored a series of such debates in each of the past five general elections, and has begun the planning, preparation, and organization of a series of nonpartisan debates among leading candidates for the Presidency and Vice Presidency in the 2008 general election. As in prior years, the CPD's voter educational activities will be conducted in accordance with all applicable legal requirements, including regulations of the Federal Election Commission that require that debate sponsors extend invitations to debate based on the application of "pre-established, objective" criteria.

The goal of the CPD's debates is to afford the members of the public an opportunity to sharpen their views, in a focused debate format, of those candidates from among whom the next President and Vice President will be selected. In each of the last five elections, there were scores of declared candidates for the Presidency, excluding those seeking the nomination of one of the major parties. During the course of the campaign, the candidates are afforded many opportunities in a great variety of forums to advance their candidacies. In order most fully and fairly to achieve the educational purposes of its debates, the CPD has developed nonpartisan, objective criteria upon which it will base its decisions regarding selection of the candidates to participate in its 2008 debates. The purpose of the criteria is to identify those candidates who have achieved a level of electoral support such that they realistically are considered to be among the principal rivals for the Presidency.

In connection with the 2008 general election, the CPD will apply three criteria to each declared candidate to determine whether that candidate qualifies for inclusion in one or more of the CPD's debates. The criteria are (1) constitutional eligibility, (2) ballot access, and (3) electoral support. All three criteria must be satisfied before a candidate will be invited to debate.

B. 2008 Nonpartisan Selection Criteria

The CPD's nonpartisan criteria for selecting candidates to participate in the 2008 general election presidential debates are:

1. Evidence of Constitutional Eligibility

The CPD's first criterion requires satisfaction of the eligibility requirements of Article II, Section 1 of the Constitution. The requirements are satisfied if the candidate:

- a. is at least 35 years of age;
- b. is a Natural Born Citizen of the United States and a resident of the United States for fourteen years; and

c. is otherwise eligible under the Constitution.

2. Evidence of Ballot Access

The CPD's second criterion requires that the candidate qualify to have his/her name appear on enough state ballots to have at least a mathematical chance of securing an Electoral College majority in the 2008 general election. Under the Constitution, the candidate who receives a majority of votes in the Electoral College, at least 270 votes, is elected President regardless of the popular vote.

3. Indicators of Electoral Support

The CPD's third criterion requires that the candidate have a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly-reported results at the time of the determination.

C. Application of Criteria

CPD's determination with respect to participation in CPD's first-scheduled debate will be made after Labor Day 2008, but sufficiently in advance of the first-scheduled debate to allow for orderly planning. Invitations to participate in the vice-presidential debate will be extended to the running mates of each of the presidential candidates qualifying for participation in CPD's first presidential debate. Invitations to participate in the second and third of CPD's scheduled presidential debates will be based upon satisfaction of the same multiple criteria prior to each debate.

Adopted: October 2007

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Attachment E

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Face to Face: A Guide to Candidate Debates

- ☐ Executive Summary
- ☐ Debate Basics
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- ☐ Debate Formats
- ☐ Negotiating with Candidates
- ☐ Broadcasting Your Debate
- ☐ Promoting the Debate
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- ☐ Evaluation and Other Follow-up
- ☐ Conclusion
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Expand All

Legal Considerations

A. The Regulatory Framework

Candidate debates, as an important part of the American political process, are regulated by federal and state election laws and regulations; broadcast debates are subject to Federal Communications Commission (FCC) rules. Although challenges to debate sponsors under these rules are infrequent, sponsors should understand the relevant regulations and take them into consideration when planning and staging a debate. Debates are high-stakes campaign activities for candidates, and candidates who have been hurt politically by a debate or have not been invited to participate may challenge sponsors under these laws.

In addition, organizations designated as 501(c)(3) by the Internal Revenue Service (IRS) must be especially careful to protect their status by making sure that their debates do not, in any way, promote or advance one candidate over others.

Sponsors who plan debates in accord with the applicable laws and regulations will be secure in the knowledge that they are meeting their legal responsibilities and will have a far better chance of prevailing if they face a legal challenge.

Federal Election Commission (FEC) Regulations. The Federal Election Commission was established to enforce limits on contributions to the expenditures made on behalf of candidates for federal office by individuals or groups. The FEC rules apply only to candidates for federal office.

Under most circumstances, providing a platform for a federal candidate to address the public or providing information about a candidate is considered to be a contribution of "something of value," and thus subject to the contributions or expenditures limitations and prohibitions of the federal election laws. However, non-profit 501(c)(3) and 501(c)(4) type organizations, as well as broadcasters, bona fide newspapers, magazines and other periodicals may stage debates *without* triggering campaign finance limitations *provided that*:

1. the debates include at least two candidates;

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your email.



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2. the sponsoring organization does not structure the debate to "promote or advance" one candidate over another; and
3. the sponsoring organization uses "pre-established criteria" to determine which candidates to include in the debate. For general election candidates this criteria may *not* use "nomination by a particular political party as the sole objective criteria to determine whether to include a candidate in a debate."

Organizations may use their own funds or accept donations from corporations or labor organizations for such debates. Federal candidate events that do *not* meet the FEC definition of "debate," such as single candidate appearances ("empty chair debates") or consecutive candidate interviews ("forums"), may be considered as contributions subject to campaign finance limitations, or as illegal corporate contributions to a federal candidate.

Federal Communications Commission (FCC)

Regulations. The Federal Communications Commission regulates radio and television broadcasters and cablecasters. Under its regulations, any broadcaster or cablecaster that permits a candidate for any public office (federal, state, or local) to use its facilities must provide *all* other legally qualified candidates for the same office with equal opportunities for use. (Appearance by candidates on regularly scheduled, bona fide newscasts, news interviews and news documentaries are exempt from this requirement, as are appearances during broadcast coverage of news events such as debates.)

The FCC regulations apply to the debate broadcaster, not the sponsoring organization. However, debate sponsors should be aware of the restraints placed on the broadcasters. In order to qualify as exempt news events, debates must meet the following requirements:

- a broadcaster's decision to cover a debate should be based on a good faith, reasonable judgment of its news worthiness (and not on a desire to promote or disadvantage a particular candidate);
- debates must not be edited and must be broadcast in their entirety;
- debates should be broadcast live or reasonably soon after they take place;
- at least two candidates must appear in any debate.

Internal Revenue Service Rules. Federal tax law provides that organizations which are exempt from federal income tax under section 501(c)(3) "may not participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office." This prohibition applies equally to campaigns for federal, state, and local office.

The IRS, however, considers forums and debates on political and social issues as educational activities that may be appropriately conducted by section 501(c)(3) organizations provided certain guidelines are followed.

The general standards are that the procedures for the debates must not show a bias or preference for or against any particular candidate and that the overall effect must be fair and impartial treatment of all candidates, with nothing that promotes or advances one candidate over another.

More specific rules are these:

1. The sponsoring organization must have a record of concern with public and legislative issues.
2. All viable candidates must be invited to the debate, and "reasonable, objective" criteria must be used to determine which candidates are "viable."
3. The choice of location for the debate must be dictated by non-political considerations.
4. Each debate must address a broad range of issues, including (but not limited to) issues considered to be of important educational interest to the organization's members. The debate can, however, be limited to the range of issues with which the sponsoring organization is chiefly concerned, provided the range is reasonably broad.
5. Questions must be prepared and presented to candidates by a nonpartisan panel composed of knowledgeable persons who are independent of the sponsoring organization. The format need not be limited to questions, but can include a general discussion among the candidates.
6. Each candidate must have an equal opportunity to present his or her views, and questioning procedures must not be biased to favor or hinder any candidate.
7. The debate must be run by a moderator, who does not act as a spokesman for the organization's views on the subjects discussed, but has the sole function of ensuring that the ground rules are observed.
8. At the beginning and end of each debate, the moderator must state that the views expressed are those of the candidates, not of the sponsoring organization, and that the sponsorship of the debate is not an endorsement by the sponsor of any candidate.
9. The moderator must also state that all viable candidates have been invited. IRS staff members have informally advised that, if one or more of the invitees declines, the debate can go forward, but, in that event, the sponsor should exercise special care to avoid favoritism to those candidates who do participate.

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0. The organization may report what happens at the debate, but must do so without editorial comment or endorsement and must circulate the report only through its normal channels of communication.

More liberal IRS rules apply to organizations that are exempt from federal income tax under section 501(c)(4). These organizations may intervene in political campaigns on behalf of candidates, subject only to the restriction that such intervention not be their primary purpose.

State Laws. Although the FEC regulations apply only to candidates for federal office, many states have campaign finance laws and laws that limit the activities of tax exempt organizations. Sponsors of debates for candidates for state and local office should be aware of any relevant state laws.

B. Applying Regulations

Primary Elections. Primary election debate sponsors can treat each party's primary as a separate election, according to decisions by the FEC and the IRS and supported by the courts. That means that organizations can limit participation in a primary election to those candidates seeking the nomination of one party. Also, an organization may hold a debate for the candidates in one party's primary election without any obligation to hold debates for other parties' primaries.

Candidate Selection. It is especially important to consider the regulatory constraints on candidate debates when deciding which candidates should be invited to participate. The most prudent route is to invite *all* the candidates running for a particular office (or, in the case of a primary election debate, all candidates for a particular party's nomination). There are many situations, however, when this is not wise or feasible. For example, one or more marginal candidates may be part of a large field of candidates running for the same office. The debate sponsor may decide that the public interest would be served best by limiting participation to "significant" candidates. A debate among a large number of candidates, especially if there are time constraints, might be unmanageable and not provide voters with useful information.

Sponsor must make candidate selection decisions in a clear, fair and reasonable way, using "pre-existing criteria." To accomplish this, they should establish official selection criteria well in advance of selecting the candidates for a particular debate, and then use those criteria to determine which candidates are eligible to participate. Sponsors must realize that, even if they use objectively applied selection criteria, they may be challenged by uninvited candidates and may face objections ranging from protest rallies to lawsuits or complaints to federal or state agencies. But if the sponsor has established official debate goals and selection criteria in advance of any decisions on which candidates to include, it will be possible to demonstrate that the sponsor's decisions were reasonable, not arbitrary, and not made to promote or disadvantage any candidate. Even if a debate sponsor intends to invite all candidate running for an office, or if only two candidates are running, it is helpful to have criteria in place to deal with unexpected circumstances such as last-minute write-in candidates.

Ideally, selection criteria should be developed for each debate sponsored, based on the nature of the election (primary, general, special, partisan or nonpartisan, the likelihood of minor party, independent or write-in candidates and whether the debates will be broadcast. Criteria used for one debate should not be automatically applied to another, but may serve as a guide. Criteria should be

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reviewed and readapted for each debate an organization sponsors.

Note: For debates involving general election candidates, "nomination by a particular political party" may not be used as the sole criteria for determining which candidates will be invited to appear, according to FEC regulations. Thus, it would not be permissible to establish advance criteria which stated that the Republican and Democratic general election nominees would be invited to participate in a debate.

How to Set Criteria for Candidate Selection. Use the following checklist to set and apply criteria for determining candidates' eligibility to participate in a debate:

1. Define the organization's goal for sponsoring the debate C i.e.: educating voters about candidates' views on issues and stimulating voter interest and participation in the election.
2. Develop criteria that:
 - o implement the debate goal
 - o are nonpartisan, fair, impartial and clear
 - o can be applied objectively
3. Adopt the criteria before any candidates have been invited. For organizations with a board and/or officers, the criteria should be adopted as an official action.
4. State clearly that the candidates must meet all the criteria to be eligible.
5. Send written invitations to all candidates that are clearly eligible. Include copies of the debate goals and selection criteria.
6. If other candidates seek an invitation, the burden of proof is on them to establish eligibility. The sponsor may request information to support a candidate's claim to eligibility.
7. Information about the debate goals and selection criteria should be included with publicity announcing the debate to the public and the news media. Send copies to the invited candidates and to others on request.
8. Once criteria have been adopted, stick to them and apply them consistently. The criteria are not negotiable; do not yield to pressure to change or waive them to accommodate particular candidates.
9. Develop and retain contemporaneous written documentation of the basis for determining not to invite a particular candidate, or for denying a candidate's request to participate. Be sure that the rationale explicitly references the previously-adopted selection criteria.

EXAMPLES OF CRITERIA THAT HAVE BEEN USED TO SELECT CANDIDATES TO PARTICIPATE IN A DEBATE

Constitutional Eligibility: The candidate, if elected, must be legally qualified to hold the office under federal and state law.

Eligibility to be on the Ballot.

Evidence of a Campaign: (especially applicable in federal or statewide elections or in states where ballot access is unduly difficult or jurisdictions with a tradition of write-in candidates). The candidate has made a public announcement of an intention to run; the candidate has a campaign headquarters and staff, has issued position papers and has made campaign appearances.

"Significant" Candidacy: (used to limit debate participation to candidates who have a reasonable chance of being elected).

This is the most difficult criterion to apply, and depends on information that is not always available, especially in local elections. Several factors can be used to measure significance, depending on the availability of information.

- Choose those factors that are relevant to the particular office or election.
- Choose those factors for which there is sufficient information to apply them objectively.
- Clearly state those factors that will be used to measure significance.
- State that the organization will use its "good faith judgment" in considering factors to determine "significance."

1. Results of major, reliable, nonpartisan public opinion polls C use a reasonable percentage, i.e.: 10-15 percent C to show evidence of support, keeping in mind the probable number of candidates. Possible polling sources include professional pollsters, independent newspapers and broadcasters and universities. Set a cut-off date, so there will be sufficient time to make final debate plans.
2. Eligibility for public matching funds (if available).
3. Coverage by the media as a recognized candidate.
4. Do not condition general election debate eligibility solely on status as nominee of a particular party.

C. Copyright Issues

Who "Owns" a Debate and Why Does it Matter? Once a debate has been recorded C whether by video or audio tape or as a written transcript C the question of who controls the use and distribution of the record or profits from its sale falls under the copyright laws. Unless there is a written agreement to the contrary, everyone who participated in creating a debate, including the sponsor, the broadcaster, candidates, moderator, panelists, even producers and camerapersons, has a potential claim to ownership of at least part of the final product.

An organization that wants to have control of the distribution and use of debate tapes and/or transcripts C for example, to prevent the use of debate excerpts in partisan political ads C should assert its claim of copyright ownership in written agreements with broadcasters and

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candidates.

A copyright notice should appear on all copies of tapes and transcripts (consisting of the word "copyright" or the letter "c" in a circle, the name of the copyright owner and the year of publication.) In order to challenge an infringement of a copyright, and organization should seek the assistance of a legal expert who specializes in this complex area of the law.

D. Legal Protection

Plans for any major debate should include provision for legal advice in case it is needed. Organizations should be prepared to secure free or reduced rate assistance, perhaps from attorneys who are members or relatives of members or from law school faculties or major law firms that provide pro bono help to nonprofit organizations. Most legal challenges are brought by candidates who are not asked to participate in the debate and are designed to stop the debate from happening. An organization that has easy access to legal assistance can cope with the disruption of an unexpected, last minute legal challenge.

Organizations may also need legal assistance to:

- keep current with federal, state and local requirements;
- review criteria for consistency with current applicable laws;
- draft or review agreements with candidates, broadcasters or cosponsors and, if necessary, advise on the enforcement of agreements;
- draft or review contracts with staff, consultants or managers of debate sites;
- protect the organization's copyright interests in the debate record.

A LEGAL GLOSSARY FOR DEBATES

Federal Election Commission (FEC). An agency established by the Federal Election Campaign Act of 1971 to administer the Act and enforce limits on contributions that can be made to, or expenditures that can be made on behalf of, candidates for federal office by individuals and groups.

Candidate for Federal Office (for purposes of FEC regulations). Persons running for President, Vice-President, senator, representative, delegate or resident commissioner to the U.S. Congress. A "candidate for federal office" has received contributions or made expenditures exceeding an aggregate of \$5,000; others have received or spent more than an aggregate of \$5,000 on her or his behalf; or, after written notification from the FEC, she or he has failed to disclose such contributions or spending by others.

Debate (as defined by the FEC). An event staged by a section 501(c)(3) or (c)(4) type organization or a broadcaster, cablecaster, or by bona fide newspaper or magazine that:

- includes two or more candidates;

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- is staged in a way that it is fair to all participating candidates, i.e., the format does not promote or give an advantage to one candidate over the other(s); and
- the candidates appear concurrently, in face to face confrontations, with opportunities to respond to each other.

Federal Communications Commission (FCC). An agency established by the Communications Act of 1934 which regulates broadcasters and cablecasters. Section 315(a) of the Act provides that whenever a broadcaster or cablecaster permits any legally qualified candidate for any public office to "use" a broadcast station or cable facilities, it must also afford equal opportunities for uses to all other legally qualified candidates for that office.

Legally Qualified Candidate. (as defined by the FCC) An individual who:

- has publicly announced an intention to run for nomination or office;
- is eligible under the applicable laws to hold the office being sought; and
- either has qualified to be on the ballot, or has publicly committed to be a write-in candidate and can show that the candidacy is bona fide (for example, by making campaign speeches, distributing literature, issuing press releases maintaining a campaign committee, and/or establishing campaign headquarters.)

Use (for purposes of FCC regulations). Any broadcast or cablecast of a legally qualified candidate's voice or picture in such a way that he or she can be identified by listeners or viewers, even if the appearance is not for the purpose of discussing the candidacy.

Nonpartisan Organization (as defined by the Internal Revenue Service (IRS)). A nonprofit organization that is recognized by the Internal Revenue Service as tax exempt under sections 501(c)(3) and 501(c)(4) and that does not endorse, support or oppose political candidates and parties.

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